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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 406

FRANK MADAFFER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

EDWARD E. PETRILLO,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Frank Madaffer, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in this case, August 2, 1945.

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C.; Section 347(a),

and under Sections 687, 688, Title 18, U. S. Code, and the Rules of Criminal Procedure adopted thereunder, particularly Rule 11. This petition is filed within thirty days from the date of the judgment, in accordance with the rules.

Opinions Below

The decision of the United States Court of Appeals for the Third Circuit, now sought to be reviewed, is as follows:

"Per CURIAM:

The judgment of the District Court is affirmed."

There was no other opinion in the District Court.

Statement of Matter Involved

I

The judgment of the Circuit Court of Appeals sought to be reviewed, affirmed a judgment convicting the petitioner and others, of violating Section 398 of Title 18, of the Criminal Code of the United States, in that he conspired with the other co-defendants to transport certain girls, to-wit: Madeline Ruth Smith and her sister, Mary Jane Michaelchick, from Youngstown, Ohio, to Meadville, Pennsylvania.

There were several indictments, which, in substance, charged that petitioner and other co-defendants, between the dates of December 7, 1941, and January 20, 1943, conspired to violate the provisions of the aforesaid Statute. The indictments also charged the petitioner and the other co-defendants with the commission of certain overt acts in pursuance of the conspiracy.

The case came on for trial before a Judge of the District Court for the Western District of Pennsylvania, and a Jury, in the city of Pittsburgh, Pennsylvania, on the 14th day of December, 1944. The jury found all of the defendants

guilty, as indicted. Sentence was pronounced on the defendants on the 5th day of January, 1945. Petitioner was sentenced to three years imprisonment on the first indictment, two years on the second indictment, and three years on the third indictment, to run concurrently.

II

The case was tried by the prosecution and submitted by the trial court to the jury on the specific issues of petitioner's participation in the crime of transporting the two girls, Madeline Ruth Smith and Mary Jane Michaelchick, from Youngstown, Ohio, to Meadville, Pennsylvania, for the purpose of prostitution, and of conspiracy to commit such a crime. The most damaging proof in this case was the evidence offered by the two witnesses produced by the prosecution, who were the alleged victims of this crime, to-wit: Madeline Ruth Smith and her sister, Mary Jane Michaelchick.

This proof tended to establish the following facts: On December 11, 1941, petitioner Frank Madaffer, together with Frank Anthony Chessario, a co-defendant, went from the City of Youngstown, Ohio, where they met two women, whom the prosecution identified as Madeline Ruth Smith, and another girl called by the name of Laura Jane Duffy, also known as "Penny", and that the defendant transported these two girls from the city of Youngstown, Ohio, to Meadville, Pennsylvania, where they were placed in a house of prostitution.

Madeline Smith, however, when she took the stand, testified that on the 11th day of December, 1941, when she met petitioner Madaffer in Youngstown, she was alone, and not in company with Laura Jane Duffy, alias "Penny". Laura Jane Duffy, when she took the stand, testified in her direct examination, and on cross-examination, that she was not

transported by petitioner Frank Madaffer from Youngstown, Ohio, to Meadville, Pennsylvania, but by Frank Chessario, a co-defendant and by another man, who, the witness stated most positively, was not petitioner Frank Madaffer. On Page 162 of the transcribed notes of testimony, Miss Duffy states: "I never met Frank Madaffer in Youngstown, Ohio." The sister of Madeline Smith, Mary Jane Michaelchick, who before her marriage was Mary Jane Smith, testified that she met Frank Madaffer during the month of May, 1942, at the Youngstown Hotel in Youngstown, Ohio, having been introduced to him by his sister, Madeline Smith, and that she made arrangements with him to go to Meadville, Pennsylvania, some following Friday afternoon, and that in pursuance of said arrangement, she went to Meadville and was placed in a house on Park Avenue, where she practiced prostitution. She testified, however, that Frank Madaffer, the petitioner in this case, was accompanied by a man named Ben Kaufman, and not by Frank Chessario, as alleged by the prosecution. These (Frank Chessario, Madeline Smith and her sister Mary Jane Michaelchick) were the only witnesses who testified as to the actual transportation from Ohio to Pennsylvania. Ben Kaufman was not called as a witness by the prosecution and was not charged as a defendant in the case, neither was a brother of the co-defendant, Frank Chessario, who was named by some of the witnesses as one of the persons who had participated in the transportation of the two aforesaid girls from Ohio to Pennsylvania. The other witnesses, and there were many of them, frankly testified that Frank Madaffer had nothing to do with their transportation in and out of the city of Meadville.

Petitioner denied all allegations charging him with the commission of the alleged crime, stating that he had never made any arrangements to transport Madeline Smith, or

her sister, Mary Jane Michaelchick. He denied having had any connection with a house of prostitution located in the city of Meadville, Pennsylvania, or in any other place, and insisted that his former friend, Frank Chessario, falsely was seeking to involve him because of ill feelings engendered by the failure on the part of his said former friend to repay a loan in the sum of Nine Hundred ($900.00) Dollars, which loan petitioner had made to the said Frank Chessario during the time of the alleged transportation and operation of the house of prostitution. Petitioner also stated that Madeline Smith, one of the most important government witnesses, had been very friendly with him at one time, and that later they had some disagreement which caused her to become very bitter against him. This disagreement appeared to be entirely of a sentimental nature.

The petitioner's guilt or innocence, as an alleged participant in the conspiracy and the overt act, depended entirely on the weight which the jury would naturally attach to the credibility of the witnesses and alleged accomplices. It was, therefore, of great importance that the jury scrutinize with special care the testimony of those witnesses, so that it could determine if there existed any bias or personal feeling, which might cause said witnesses to commit perjury in order to falsely involve the petitioner and thus gain a sordid satisfaction.

The case came on for trial on December 14, 1944, at 10 A. M., which was on a Thursday. Madeline Smith took the stand and testified on the afternoon of that day. Upon the adjournment of that day's session, petitioner brought to the attention of his counsel, Edward E. Petrillo, certain actions and statements on the part of said witness Madeline Smith, which occurred during the day and night immediately preceding the opening of the trial, that is between

the dates of December 13th and December 14th, 1944. These actions and statements were of such importance that, in the opinion of counsel for the petitioner, they strongly indicated the existence of one of the most gross and flagrant instances of perjury ever attempted during the trial of a case. It became necessary to then cross-examine the witness in order to expose the falsity of her previous testimony. During the following morning's session (i.e. December 15th) and before the noon adjournment, petitioner's counsel requested the court for leave to further cross-examine the witness Madeline Smith. The request then made is as follows:

> "Mr. Petrillo: On behalf of the defendant Madaffer, we would like in the first place to have some further cross examination of the defendant Shirley Cooper and the witness Madeline Smith; and then also on behalf of Frank Madaffer we would like to make our own witness the witness Laura Duffy, who is known as Penny and the witness Martizen for rebuttal, and the witness Sillato for rebutttl."

The Court made no ruling on this request (see notes of testimony, pages 243 and 254), and recessed until 1:30 o'clock in the afternoon.

Shortly after the opening of the afternoon session, the Government, after recalling a witness for short interrogation, and after offering in evidence certain Government exhibits, rested its case. This was, of course, in direct disregard of the request of petitioner's counsel for permission to cross-examine the witness Madeline Smith. Therefore, counsel for petitioner immediately objected as follows:

> "Mr. Petrillo: If the Court please, I wanted to have the witness Smith for further cross examination. I think I told Mr. Boyle before noon adjournment."

This, the Court refused to permit.

III

How important was the cross-examination of this witness? In the first place, it must be remembered that Madeline Smith, and her sister, Mary Jane Smith Michaelchick were the two girls alleged to have been transported from Ohio to Pennsylvania. They were not co-defendants, and much credibility was attached by the jury to their testimony. In the second place, it must be remembered that the petitioner denied that he had transported either of these women. In the third place, the following evidence which was submitted by petitioner on direct examination, upon the trial court's refusal to permit cross-examination of the witness involved, was of such nature as to strongly indicate the existence of such bias on the part of the said Madeline Smith, and her sister, as to lead inevitably to the conclusion that perjury had been committed by them in order to obtain a sordid satisfaction out of injuring petitioner.

This evidence was to the effect that Madeline Smith approached petitioner, while he was standing in the corridor of the Court House, waiting for his trial to commence, and sought to engage him in conversation. This was sometime during the afternoon of December 13, 1944. Petitioner refused to speak with her, and told her to stay away from him for the reason that she was a Government witness who was scheduled to testify against him and he didn't want to become involved in any more trouble because of her. Miss Smith thereupon told him: "I will not get you into any trouble," and, after stating that she was not a witness in his case, pulled out a card and showed it to him to prove that her name was not listed as a witness in his case. She then said: "My sister is on your case." Finally, she requested petitioner to meet her outside of the Court House, which he refused to do. Petitioner, being suspicious of

Miss Smith's actions, and fearful of possible further wrongdoing on her part, immediately reported the matter to one of the F. B. I. agents, a Mr. Hopkins, who at that time was somewhere in the same corridor.

During the night, however, Madeline Smith went to the Fort Pitt Hotel, in the city of Pittsburgh, where the trial of this case was taking place, and rapped at the door of the petitioner's room, and asked him to let her in. Petitioner stated that he recognized the voice as that of Madeline Smith, and that he refused to admit her. It was testified that she kept insisting that she wanted to get in, and persisted in trying to gain admission, and that petitioner refused to let her in. This attempt on her part to get into petitioner's room at the hotel was brought to a stop by a house detective, who escorted her downstairs, and told her to use the telephone if she wanted to talk to the petitioner. Madeline Smith then talked to the petitioner over the telephone for about twenty minutes during which time she told him that if he would come to her room at the William Penn Hotel, where she was staying, where they could talk undisturbed, she would "ease his worries." This statement she repeated several times. Later, when he refused to comply with her request, Madeline Smith became very angry, and said over the telephone: "I and Jane (meaning her sister Mary Jane Smith Michaelchick) will make it mighty hot for you if you don't." This she also repeated several times until the conversation was brought to an abrupt end by the telephone operator switching her off.

The morning following this conversation (i.e. December 14th) the trial of the case started and Madeline Smith testified against petitioner, and later was followed by her sister, Mary Jane, who also testified against him. The sister's testimony, however, was wholly discredited by a witness produced by the defense, and by documentary evidence, tending to show that the petitioner at the time of the

alleged transportation of the said Mary Jane Smith Michaelchick was not either in the state of Pennsylvania or Ohio, but was in California with his wife, who was ill at that time.

Counsel for petitioner was not informed of Madeline Smith's conduct, which had taken place during the night, when the trial of the case started on the morning of December 14th. However, after the Court had adjourned its session in the afternoon, the petitioner told his counsel what had taken place, and said counsel made an investigation at the hotel, talked with the house detective, and found the facts to be true. He therefore subpoenaed the house detective to come into court the following morning.

On the morning of December 15th counsel for the petitioner requested the Court for leave to further cross-examine the witness Madeline Smith, as requested the day before. When this request was not granted by reason of the fact that the Government rested its case, without giving the petitioner an opportunity to further cross-examine the witness, counsel for the petitioner again requested the court for such leave, as follows:

> "Mr. Petrillo (at side bar): Counsel for defendant Frank Madaffer moves the Court for leave to recall the Government witness Madeline Smith for the purpose of further cross examination, and assigns the following reason for said motion: Counsel has been informed and verily believes and expects to be able to prove that the witness Madeline Smith on the inception of this case, and while the defendant was on trial, approached him and tried to obtain from him an appointment, which he refused to give to her; that later, yesterday morning, December 14, before she came to court, she went to his place of residence, which at that time was Room 286 Fort Pitt Hotel, Pittsburgh, Pa., and tried to force an entrance into his room, which he refused to permit her to do; that she told him at the

time through the door and then on the telephone that she was "going to make it very hot for him, and her sister too," if he wouldn't talk to her. He refused to do that. We claim this shows bias on her part; and on the basis of these facts, which we intend to prove to the Court, we have to ask that her testimony be stricken from the record in its entirety, because it is based upon falsehood and prejudice."

Mr. Boyle: That it seems to me is a matter which should be affirmatively proved and not proved by cross examination.

The Court: Yes, it would be a part of your defense.

Mr. Petrillo: The only thing I want to ask is whether she talked to him. If you think not, I won't ask her then. My impression was I had to lay the foundation for testimony of that type, and I could only lay it by first cross examining the witness. I may be mistaken about the rules of procedure, but that was my impression.

The Court: I think, when your client is on the stand you could ask him questions about attempts of this woman to see him.

Mr. Boyle: If there is any bias, you could prove, that would be perfectly relevant as a matter of defense.

The Court: Then, of course, the Government would have a right to put her on the stand in rebuttal to deny that, if she denies it.

Mr. Petrillo: Would I be permitted, as a matter of defense, to call my client just for this purpose, and then offer further, additional testimony to prove that particular action on her part?

The Court: I think you cannot until you come to your part of the case.—Such of the counsel as desire to make an opening statement to the jury may do so. (See Transcript of testimony, Pages 261, 262, 263.)

Counsel for the petitioner then moved for a directed verdict in all of these indictments, that is, E-4511, E-4512 and E-4515. All these motions were denied by the Court to which counsel requested an exception.

The case then proceeded with the defendant stating what had transpired between him and the witness Smith, and then denying the allegations of the prosecution and particularly of the witness Smith and her sister.

The house detective was called and he identified Madeline Smith as the girl who attempted to enter the room of the petitioner in the Fort Pitt Hotel. The Government did not put Madeline Smith on the stand to deny those facts, as the Court had intimated the prosecution might do, thus depriving the petitioner of the opportunity to cross-examine said witness concerning such very important evidence of bias and unscrupulousness.

The Court at the end of the trial of the case did not comment upon any parts of the evidence, but left the matter in the hands of the jury for its consideration. No mention was made of what had transpired between the witness for the Government, Madeline Smith, and the petitioner, which evidence was not denied by Miss Smith or by the prosecution. The jury, therefore, undoubtedly disregarded the matter entirely as of no importance, and brought in a verdict of conviction against the petitioner.

Questions Presented

There are five questions presented:

1. Did the denying of petitioner's motion to further cross-examine the witness Madeline Smith violate the requirements of the due process of law clause contained in the Fifth Amendment to the United States constitution?

2. Did the trial court's refusal to permit the further cross-examination of said witness materially prejudice petitioner's right to a fair and impartial trial?

3. Can the judgment of conviction be sustained when petitioner's right to a fair and impartial trial was violated in

that he was unable to prove by proper cross-examination the falsity of the accusations against him and the unscrupulous willingness of the Government's witness to testify falsely against him?

4. Did the Circuit Court of Appeals err in holding that no error had been committed by the Court below in refusing the petitioner's request to further examine such an unscrupulous witness, and, by such judgment, deprive the petitioner of a fair and impartial trial?

5. Did the Circuit Court of Appeals in sustaining the judgment of the Court below violate the fundamental rights of the petitioner?

Reasons for Allowance of the Writ

1. The questions presented involve basic rights under the Constitution of the United States and the Articles of Amendment thereto. These rights have been affirmed frequently by this Court as fundamental and the applicability of the provisions of the Fifth Amendment with respect to a defendant's right to an impartial trial under the guarantee of the Sixth Amendment has often been stressed.

2. The decision in the present case is in conflict with and contrary to the decision of the Circuit Court of Appeals of the Ninth Circuit, in the case of *Cossack* v. *United States*, reported in Federal Reporter (2d Series) Volume 63, at Page 511, which held:

> "Refusal of defendant's offer of newly discovered evidence impeaching Government's witness, after repeated unsuccessful offers to lay foundation therefor during and after witness' cross-examination held erroneous."

Your petitioner verily believes that this application presents a case cognizable by this Honorable Court in order

to secure uniformity of decisions among the Circuit Courts of Appeals, and under the Constitution and Statutes of the United States and the rules of this Honorable Court.

WHEREFORE, comes your petitioner, and respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review a full and complete transcript of the record and all proceedings in said suit, being the case numbered and entitled in its docket as "United States of America, Appellee, v. Frank Madaffer, Appellant, No. 8832, October Term, 1944, and that the judgment of said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

FRANK MADAFFER,
Petitioner;

By EDWARD E. PETRILLO,
Counsel for Petitioner.